

Davis-Lynch vs. Weatherford

January 7, 2009

Page 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

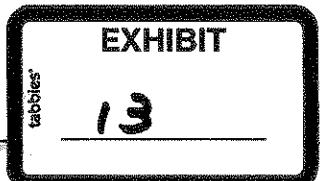
DAVIS LYNCH :
Plaintiff, :
VS. : C.A. NO. 6:06CV335
WEATHERFORD, : TYLER, TEXAS
Defendants. : JANUARY 7, 2009
 : 10:30 A.M.

TRANSCRIPT OF PRETRIAL
BEFORE THE MAGISTRATE JOHN D. LOVE
APPEARANCES:

APPEARANCES:

FOR THE PLAINTIFF: MR. ANDY TINDEL
PROVOST HUMPHREY
112 LINE STREET, SUITE 304
TYLER, TEXAS 75702
(903) 596-0900

MR. ERIC M. ADAMS
MR. ERNEST W. BOYD
MEHAFFY WEBER
ONE ALLEN CENTER
500 DALLAS STREET
SUITE 1200
HOUSTON, TEXAS 77002
(713) 655-1200



CURRY JOHNSON JULIAN, INC.
www.tylerreporters.com

903.533.1172

Electronically signed by Kimberly Julian (401-385-935-7323)

800.533.1129

3294b6f3-dc09-4e00-bb8a-a41d3f3fe3b2

Page 2

Page 4

1 FOR THE DEFENDANT: MR. J. DEAN LECHTENBERGER
 2 MS. JOAN E. BECKNER
 3 MR. ERIC S. SCHLICHTER
 4 HOWREY, LLP
 5 1111 LOUISIANA, 25TH FLOOR
 6 HOUSTON, TEXAS 77002-5242
 7 (713) 787-1529

8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

MS. ELIZABETH L. DERIEUX
 CAPSHAW DERIEUX, LLP
 1127 JUDSON ROAD, SUITE 220
 P.O. BOX 3999
 LONGVIEW, TEXAS 75606-3999
 (903) 236-9800

COURT REPORTER: MS. KIMBERLY JULIAN
 CURRY JOHNSON JULIAN, INC.
 CERTIFIED SHORTHAND REPORTERS
 P.O. BOX 270
 TYLER, TEXAS 75710

PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY,
 TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

1 question, there has not been a discussion of how to
 2 proceed this morning. In our opinion, I don't think
 3 there's really any need to take up the motions
 4 separately, seriatim, I think they're sort of all
 5 bound together.

6 And as far as if the Court wants to go
 7 forward on the Motion to Strike, it was filed first
 8 chronologically. Or if the Court wants to go forward
 9 on the Motion to Supplement, it doesn't make us any
 10 difference one way or the other. This is really all
 11 the same set of operative facts that we're going to be
 12 dealing with.

13 THE COURT: Yes, I think they're all
 14 sort of bound up together. So I think due to the fact
 15 the defendants filed their motion first and I think
 16 they've got some issues with the original contentions
 17 and these proposed supplement contentions, we'll hear
 18 from the defendants first.

19 So Mr. Lechtenberger.

20 MR. LECHTENBERGER: Your Honor, do you
 21 prefer here or the podium?

22 THE COURT: I prefer the podium. But
 23 it's up -- you know, if you're going to be needing
 24 some paper or things of that nature or use the
 25 projector, you can stay there.

Page 3

Page 5

1 THE COURT: Ms. Morris, you may call
 2 the case.

3 COURTROOM DEPUTY: The Court calls Case
 4 Number 6:07-CV-559, Davis-Lynch versus Weatherford
 5 International.

6 THE COURT: Announcements.

7 MR. TINDEL: Good morning, Your Honor.
 8 Andy Tindel, I'm here on behalf of Davis-Lynch. And
 9 with me I have Butch Boyd and Eric Adams. We're ready
 10 to proceed.

11 THE COURT: The Defendant?

12 MS. DERIEUX: Elizabeth Derieux on
 13 behalf of Weatherford. With me today is Dean
 14 Lechtenberger who will be making the presentation on
 15 behalf of the Defendant. With us, also, Joan Beckner,
 16 Eric Schlichter. And we are ready to proceed.

17 THE COURT: All right. Thank you.
 18 We're here today on two motions; one a Motion to
 19 Strike and one a Motion for Leave to Supplement.

20 I don't know if the parties have discussed
 21 the best way to approach the order of motions. Has
 22 there been any discussion about that, who would like
 23 to argue first?

24 Mr. Tindel?

25 MR. TINDEL: Your Honor, to answer your

1 MR. LECHTENBERGER: I will eventually.

2 THE COURT: That's fine.

3 MR. LECHTENBERGER: I have a
 4 demonstrative. If I may approach of the bench, I have
 5 a copy for you and opposing counsel already has a copy
 6 as well.

7 THE COURT: All right. Thank you.

8 Now, let me just say this: I realize this
 9 case has some years on it or this controversy between
 10 the parties has some years on it. We're sitting here
 11 at 10:40. I'm not planning on going -- plowing
 12 through lunch, I'm not planning on bringing y'all
 13 back.

14 So we need to get to the point and we need
 15 to get to how we can resolve this, the Court can rule
 16 on it and move on. I don't want a four-year history
 17 of what's happened.

18 So if you're going to go back four years,
 19 five years, hit the high points and let's move to the
 20 real meat of what the problem is. This case seems
 21 bogged down in quicksand, it appears, and you've got a
 22 Markman hearing in two months and things need to get
 23 moving. So we need to move this hearing along. We're
 24 not, you know, having any three- or four-hour hearing
 25 on this.

2 (Pages 2 to 5)

CURRY JOHNSON JULIAN, INC.
 www.tylerreporters.com

903.533.1172

800.533.1129

Electronically signed by Kimberly Julian (401-385-935-7323)

3294b6f3-dc09-4e00-bb8a-a41d3f3fe3b2

<p style="text-align: right;">Page 50</p> <p>1 with that, Your Honor, that's why we initiated contact 2 five different times with them.</p> <p>3 With respect to Andy's comments, Your Honor, 4 he mentioned that the current -- I'm sorry, the 5 current lead counsel took over late during the first 6 case. We don't disagree with that. We don't dispute 7 that. They were still under an obligation to review 8 the patent 3.4 disclosures of our accused product line 9 when we produced it.</p> <p>10 And they said, okay, well, they filed a 11 re-examination and so we weren't looking at documents 12 anymore. Okay. The problem is, the patent rules are 13 clear and the laws of this Court is clear that before 14 they filed the second lawsuit they were obligated to 15 go back and diligently review all the information they 16 had, including the information from their earlier 17 lawsuit in which we identify. We put them on notice 18 of more than the three accused tools.</p> <p>19 Here are the drawings under Patent Rule 3.4 20 that show how these tools operate. They were 21 obligated, before they filed this lawsuit, to go back 22 and look at that information, not only before the 23 lawsuit but to include in their February '08 24 infringement contentions.</p> <p>25 Let me also clear up something else, Your</p>	<p style="text-align: right;">Page 52</p> <p>1 identified the sales summary, the sales summary that 2 Mr. Adams actually was able to prepare a list of the 3 models that he used with Mr. Logiudice. So he could 4 do it in November in preparation for Mr. Logiudice's 5 deposition, why couldn't he do it seven or eight 6 months earlier when we produced it at that point?</p> <p>7 In other words, Your Honor, this image that 8 they're trying to portray that there was so much 9 confusion in all these documents we produced, most of 10 the documents -- I mean, we told them the specific 11 documents that are related to how our tools operate.</p> <p>12 All right. There's only 50 or 60 pages of documents, 13 one for each drawing or one drawing for each model.</p> <p>14 So in essence, in late April, 2008, we 15 handed them their infringement evidence and we handed 16 them their damages evidence. Everything after that 17 only goes, at best, to willfulness and their attempts 18 to try to find something that would suggest that we 19 copied them.</p> <p>20 But that's not why we're here today. We're 21 still here for the infringement contentions which we 22 can deliver to them and we identify them by Bates 23 number, a limited number of documents which show the 24 drawings of every one of our models.</p> <p>25 So to the extent that they're trying to say</p>
<p style="text-align: right;">Page 51</p> <p>1 Honor. There's talk about all these 700,000 pages of 2 documents we produced. We did produce those 3 documents. Before we produced those -- those were our 4 electronic documents that we produced. That 5 production started around June/July of last summer.</p> <p>6 Prior to producing any of those documents, 7 we produced our 3.4A disclosures of our current 8 product line. The 55 models that they've now 9 identified, that was produced in late April, and then 10 in early May we actually identified them by Bates 11 numbers. Okay. We were in the 20,000 range at that 12 point. We identified particular -- and they mentioned 13 that in their briefs, they admit we identified the 14 specific Bates ranges for those 50 models or 55 15 models. Okay.</p> <p>16 We also produced what's attached as exhibits 17 to both motions, on the same day we produced -- in 18 late April of 2008 we produced a sales summary of 19 sales of every one of the models that we've sold. Not 20 just the three they accused, every one in our product 21 line.</p> <p>22 From that information, there is no doubt 23 which models we had sold. We identified -- we also 24 identified in response to their interrogatories in 25 May, not only did we identify the drawings, we also</p>	<p style="text-align: right;">Page 53</p> <p>1 there was confusion and all that, there's absolutely 2 no correspondence going back asking if there's 3 something unclear about our 3.4 drawings, that there's 4 any confusion about them. They didn't come and ask us 5 about them. If they were confused, you know, they 6 didn't let us know on it or we would have cleared up 7 any confusion.</p> <p>8 THE COURT: Let me ask you this: They 9 are saying -- their contention is these new products, 10 new model numbers, they're essentially just that, that 11 there are really no difference, they're just new model 12 numbers, they operate essentially the same way, at 13 least, I guess, insofar as the claims they are 14 accusing the products of infringing. What's your 15 position?</p> <p>16 MR. LECHTENBERGER: If that's the case, 17 Your Honor, why couldn't they identify the 55 models 18 earlier when they identified the other three? If 19 they're so similar, they should have easily been able 20 to comply with the patent rules which requires them to 21 identify each model by name. If they're that similar, 22 if that's their position, it's not our position, it's 23 their position. But if that's the case, there's no 24 excuse for them to wait until December to tell us that 25 when we're just weeks away from a Markman ruling and</p>

Page 54

1 we've lost a year's worth of discovery on issues that
 2 we could have done since February of 2008 if they had
 3 complied with the patent rules.

4 THE COURT: Okay. I understand that's
 5 your position. But as to the prejudice that it puts
 6 you to, what is your position? How does this
 7 prejudice you for them to add these? Setting aside it
 8 took them too long, let's set aside that issue, but
 9 how does it now prejudice you to add these products?

10 MR. LECHTENBERGER: Okay. Well, let me
 11 go back. Can I address the claims, like in 37 they've
 12 added two new tools, the second tools that would
 13 satisfy the limitations of Claim 37?

14 THE COURT: Okay. So how this
 15 prejudices you?

16 MR. LECHTENBERGER: Yes, Your Honor.

17 THE COURT: All right. Go ahead.

18 MR. LECHTENBERGER: We've already had
 19 the deposition of a third-party co-inventor. We've
 20 lost -- the fact that they have identified some new
 21 tools, tools that had been out in the prior art for a
 22 long time, we've lost our opportunity. Those tools
 23 raise new issues relating to the validity of Claim 37
 24 and inequitable conduct and issues with respect to the
 25 Markman briefing. We've lost the time needed to

Page 54

Page 56

1 MR. LECHTENBERGER: Yeah, some of them
 2 do. Not all of them. Some models operate essentially
 3 the same. But they have some of the same components
 4 in each one of them, I'll give you that, Your Honor.
 5 But again, that goes to the fact that why didn't they
 6 identify them earlier?

7 THE COURT: Okay. Let me ask a final
 8 question for you, and then I want to go back to the
 9 plaintiff and then I think we'll be done.

10 But your motion is to strike their
 11 infringement contentions. Mr. Tindel says this is a
 12 death penalty sanction. What's your response to that?

13 MR. LECHTENBERGER: Your Honor, to let
 14 them get away with what they've done for
 15 four-and-a-half years would essentially render the
 16 patent rules meaningless. The patent rules, from a
 17 public policy standpoint, are in place to prevent this
 18 type of litigation conduct from occurring. They chose
 19 this forum. They were fully aware of the patent
 20 rules. The patent rules are crystal clear. To let
 21 them now amend, it sends the wrong message to other
 22 litigants in this district, Your Honor.

23 THE COURT: All right. Let me go back
 24 to the plaintiff for a moment. I'm going to ask --
 25 I've got three questions that I want to ask.

Page 55

Page 57

1 develop that. We've been prejudiced by the fact that
 2 we've already taken the deposition of a third-party
 3 co-inventor, so we didn't have the opportunity to ask
 4 him. We would have to go back and replow that,
 5 assuming his attorney would put him up again.

6 So in other words, we've spent hundreds of
 7 thousands of dollars to get to this point to let them
 8 now add more claims back in and raise new issues
 9 relating to claim construction, validity and
 10 infringement and inequitable conduct, Your Honor.
 11 We're going to have to go back and replow old
 12 discovery. And quite frankly, it still remains to be
 13 seen whether or not they're going to give us
 14 sufficient infringement contentions, when to date they
 15 haven't given us sufficient ones.

16 THE COURT: Okay. Now, back to the
 17 products they're trying to add, how does this
 18 prejudice you?

19 MR. LECHTENBERGER: Obviously it adds a
 20 lot more tools to the case, Your Honor.

21 THE COURT: Do they operate differently
 22 as it relates -- you know, I know you dispute their
 23 contentions. As far as you can tell, what is it that
 24 -- how does it prejudice you? Do they operate
 25 differently as it relates to this claimed invention?

1 I want to first ask about this -- I know we
 2 discussed this a little bit, but Mr. Lechtenberger
 3 specifically points out that in May -- really April of
 4 '08 and May of '08 he gave you some information, he
 5 believes, sales summary and the product drawings that
 6 he says included the additional models and that why at
 7 that point could you not have accused these products?

8 MR. ADAMS: Your Honor, a couple of
 9 clarifications on that. It wasn't until the
 10 defendants produced the sales report that we had an
 11 idea as to the entire scope of how many different
 12 models we were dealing with. And that was in late
 13 April. And I believe they actually supplemented their
 14 interrogatories to refer to that sales report at the
 15 end of May.

16 Up to that point, we really didn't have an
 17 idea as to how many different models are there. The
 18 only option we had was to pour through different
 19 documents and try and isolate technical drawings from
 20 their productions.

21 And when they did refer in their 3-4
 22 disclosure about look at these Bates ranges, in that
 23 same disclosure they started off by saying, as the
 24 parties have agreed, Weatherford will rely on its
 25 previously-produced documents and then additionally

Page 62

1 the different models that we comprised from the sales
 2 report. He identified the models that he had
 3 knowledge of. We also walked through what the
 4 difference letters meant. You know, for example, if
 5 it's L42A, my memory is that A stands for aluminum, if
 6 it's a W, it's composite material. I mean, we walked
 7 through all those different distinctions.

8 I walked through the L42A model, which is
 9 one of the three that we had specifically identified
 10 before, and in walking through the infringement
 11 components or infringing components on L42A, after
 12 each component I would say, you have knowledge of
 13 these other 12 to 15, do those all have two flapper
 14 valves? His responses were yes. Do they all have,
 15 you know, an inner tubular component? Yes, they do.

16 So that's how we were trying to solidify
 17 that these particular models that he had knowledge of,
 18 which I believe was between 12 and 15, did have the
 19 same infringing components.

20 THE COURT: All right. Well, we're
 21 going to have to wrap up here. I appreciate the
 22 arguments.

23 We're going to get you a ruling as soon as
 24 we can on this. Let me just say, no matter how it
 25 comes out, as I've said before, I think it's more

Page 64

1 I certify that the above and foregoing pages
 2 contain a true and correct transcript.

3 KIMBERLY J. JULIAN

4 DATE

5
 6
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

PRINTERED DUPLICATE
 The original certified E-Transcript
 file was electronically signed
 using RealLegal technology.

Page 63

1 in-depth communication to head some of these things
 2 off and hopefully not reach this point, and that's
 3 what I'm going to be looking for in the future in this
 4 case and, of course, in all other cases that y'all are
 5 involved in.

6 Has this case been mediated?

7 MR. ADAMS: Yes, Your Honor.

8 MR. BOYD: The first mediation, there's
 9 still a second one.

10 THE COURT: Who is your mediator?

11 MR. ADAMS: Gary McGowan.

12 THE COURT: And you'll have a second
 13 round set after the Markman.

14 All right. Thank you very much for your
 15 arguments. We'll get you a ruling as soon as we can.
 16 We're adjourned.

17

18

19

20

21

22

23

24

25

17 (Pages 62 to 64)

CURRY JOHNSON JULIAN, INC.
 www.tylerreporters.com

903.533.1172

800.533.1129

Electronically signed by Kimberly Julian (401-385-935-7323)

3294b6f3-dc09-4e00-bb8a-a41d3f3fe3b2